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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA
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7 UNITED STATES OF AMERICA,

Case No. 3:17-cr-00114-LRH-VPC

8 Plaintiff,

ORDER

9 v.

10 DEVENDRA I. PATEL M.D., a.k.a.,
11 DEVENDRAKUMAR I. PATEL M.D.,

12 Defendant.

13 Before the court is defendant Devandra I. Patel's motion to stay his 37-month prison
14 sentence pending appeal. ECF No. 48. The government opposed the motion (ECF No. 55) and
15 Patel timely replied (ECF No. 56). Upon review, the court finds a stay is not warranted and denies
16 Patel's motion.

17 **I. BACKGROUND**

18 A grand jury indicted Patel on thirty-six counts of distributing a controlled substance and
19 on three counts of health care fraud. ECF No. 2. After he made his initial appearance before the
20 court on December 13, 2017, he was released on a personal recognizance bond with conditions
21 and has remained so throughout the pendency of this action. ECF Nos. 8; 16. On November 26,
22 2018, defendant pled guilty to Count 1 of the indictment, distribution of a controlled substance in
23 violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), pursuant to a plea agreement. ECF Nos. 27; 28.
24 The plea agreement provided that the government would recommend a sentence within the
25 agreed upon guideline range, 30 -37 months (Offense level 19, Criminal History Category 1),
26 and would dismiss the remaining counts. ECF No. 28. The agreement further provided that "[t]he
27 Defendant knowingly and expressly waives: (a) the right to appeal any sentence imposed within
28 or below the applicable Sentencing Guideline range as determined by the Court; (b) the right to

1 appeal the manner in which the Court determined that sentence on the grounds set forth in 18
2 U.S.C. § 3742; and (c) the right to appeal any other aspect of the conviction or sentence and any
3 order of restitution or forfeiture.” *Id.* at 12.

4 Prior to sentencing, Patel objected to the Presentence Report, which determined that his
5 total Offense Level was a 21, not a 19 as agreed upon in the plea agreement. ECF No. 31. This
6 increase in Offense Level led to a change in the guideline range from 30 to 37 months to a
7 guideline range of 37 to 46 months. Consistent with the plea agreement, the government
8 requested a 37-month sentence, (ECF No. 32), while Patel requested a sentence of 5-years’
9 probation, (ECF No. 33). After two hearings on the issue, the court sentenced Patel to 37 months,
10 to be followed by 3 years of supervised release, and a \$500,000 fine. ECF Nos. 37; 38; 40. Patel
11 was further ordered to self-surrender to the U.S. Bureau of Prisons on Tuesday, August 6, 2019.
12 ECF No. 40.

13 On May 16, 2019, Patel filed a notice of appeal. ECF No. 41. On August 2, 2019, he filed
14 a motion for a 30-day extension of the surrender date, and a motion to stay his prison sentence
15 pending appeal. ECF Nos. 48; 49. The court granted defendant’s unopposed motion for an
16 extension and continued his reporting date to September 5, 2019. ECF No. 50. The court now
17 rules on defendant’s pending motion to stay.

18 **II. DISCUSSION**

19 18 U.S.C. § 3143(b)(1) provides that:

20 the judicial officer shall order that a person who has been found guilty of an
21 offense and sentenced to a term of imprisonment, and who has filed an appeal or a
petition for a writ of certiorari, be detained, unless the judicial officer finds—

22 (A) by clear and convincing evidence that the person is not likely to flee or
23 pose a danger to the safety of any other person or the community if
released under section 3142(b) or (c) of this title; and

24 (B) that the appeal is not for the purpose of delay and raises a substantial
25 question of law or fact likely to result in –

- 26 (i) reversal
- 27 (ii) an order for a new trial,
- 28 (iii) a sentence that does not include a term of imprisonment, or
- (iv) a reduced sentence to a term of imprisonment less than the total of
the time already served plus the expected duration of the appeal
process.

1 A substantial question is one that is “fairly debatable.” *United States v. Handy*, 761 F.2d 1279,
2 1283 (9th Cir. 1985).

3 Here, as to the first factor, the court finds Patel is not likely to flee or pose a danger to the
4 community. Patel’s wife and children reside in Nevada, and he has no prior criminal history.
5 Further, he has been released on bond throughout the pendency of this action, has not missed any
6 court appearances, and has fully co-operated with pre-trial services. As a result of this behavior,
7 the court granted him almost 4 months to self-surrender and get his affairs in order after
8 sentencing. Therefore, the court finds that Patel is not likely to flee the court’s jurisdiction and is
9 not a threat to public safety if released pending his appeal.

10 As to the second factor, while the court finds that the defendant’s motion is not an
11 attempt to delay, it also finds that Patel has failed to show that his appeal raises a substantial
12 question of law or fact likely to result in a sentence that doesn’t include a term of imprisonment,
13 or a reduced term of imprisonment. Patel raises four issues that he argues are meritorious: (1)
14 there should have been a downward departure from the Guidelines to a no-jail sentence or a
15 variance under § 3553(a); (2) the two additional offense level points should not have been added
16 in determining his total offense level; (3) that the relevant conduct was not proven by clear and
17 convincing evidence; and (4) that defendant’s due process right to a fair hearing was violated
18 because evidence of relevant conduct was not proved by clear and convincing evidence.

19 First, at sentencing, the court recognized and considered all the Section 3553(a) factors
20 in effectuating a sentence for Patel that was sufficient, but not greater than necessary. Patel pled
21 guilty to Count 1 of the indictment, distribution of a controlled substance in violation of 21
22 U.S.C. § 841(a)(1) and (b)(1)(C), which is punishable by a maximum of 20 years. The court
23 properly considered Patel’s lack of criminal history, family background and family
24 characteristics. The court’s ultimate determination, a sentence of just over 3 years, was a
25 considerable departure from the maximum, and further, it appropriately fell within both the
26 guideline range determined by the presentence report, 37 to 46 months, and the guideline range
27 agreed to pursuant to his plea, 30 to 37 months. Therefore, the court finds that Patel has failed to
28 raise a substantial question for appeal as to this issue.

1 Second, Patel argues that his guideline range was improperly calculated, and the
2 additional 2 offense level points were not based on relevant conduct shown by clear and
3 convincing evidence, which deprived him of his due process right to a fair hearing. Regardless of
4 the merits of these claims, pursuant to the plea agreement, such issues are unappealable. The
5 Ninth Circuit has held that it lacks “jurisdiction to entertain appeals where there was a valid and
6 enforceable waiver of the right to appeal.” *United States v. Jeronimo*, 398 F.3d 1149, 1152-53
7 (9th Cir. 2005). “A defendant’s waiver of his appellate rights is enforceable if (1) the language of
8 the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is
9 knowingly and voluntarily made.” *Id.* at 1153.

10 It is clear to the court that Patel’s waiver encompasses his right to appeal on the grounds
11 he has raised. Pursuant to his plea, he agreed that he would not appeal a sentence imposed within
12 the applicable Sentencing Guideline range, *as determined by the court*. The court determined that
13 the applicable sentencing guideline range was 37 to 46 months and then, accordingly, the court
14 sentenced him within this applicable range to 37 months. Further, if the court did err as Patel
15 contends, the court also sentenced him within the lower applicable range of 30 to 37 months.
16 Accordingly, Patel waived his right to appeal such a sentence.

17 Additionally, the court finds that Patel knowingly and voluntarily waived his appellate
18 rights. At his change of plea hearing on November 26, 2018, the court inquired of Patel whether
19 he had had an opportunity to review the entire plea agreement, discuss it with his attorney, and
20 whether he understood the agreement. ECF No. 43 at 12. The court specifically inquired of
21 Patel’s understanding of the appellate right waiver:

22 **The Court:** But another provision that concerns me is that you have waived
23 appeal pursuant to your plea agreement. Specifically, you have waived the right to
24 appeal any sentence imposed within or below the applicable sentencing guideline
25 range which will be determined by the Court.

26 You have also given up your right to appeal the manner in which the Court
27 determines your sentence under United States law, and the right to appeal any other
28 aspect of your conviction or sentence and any order of restitution or forfeiture.

You are also waiving and giving up your right to collateral challenges.
Those challenges under Title 28 of the United States Code section 2255 which
would give you a chance to come in at a later time and challenge your conviction
or your sentence.

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The only right of appeal in your plea agreement that you're reserving to yourself would be the right to appeal a sentence which is greater than the sentencing guideline range which will be determined by the Court.

Do you understand that you may be losing all of those rights of appeal as a result of a guilty plea here in this case?

The Defendant: Yes, your Honor.

Id. at 11. Nothing in this record leads the court to find that Patel’s waiver of these appellate rights was anything less than completely knowingly and voluntarily made.


Accordingly, the Ninth Circuit lacks jurisdiction to entertain Patel’s appeal. Because the Ninth Circuit lacks jurisdiction, the court finds that Patel has failed to show that his appeal raises a substantial question of law or fact likely to result in a sentence that doesn’t include a term of imprisonment, or a reduced term of imprisonment. Therefore, the court orders Patel detained pending his appeal and denies his motion to stay execution of his sentence.

III. CONCLUSION

IT IS THEREFORE ORDERED that the defendant's motion to stay (ECF No. 48) is **DENIED.**

IT IF FURTHER ORDERED the court's prior order (ECF No. 50) that defendant is to self-surrender to the U.S. Bureau of Prisons on **September 5, 2019, by 2:00 p.m.** remains in effect.

DATED this 29th day of August, 2019.


LARRY R. HICKS
UNITED STATES DISTRICT JUDGE